

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Amendment of Section 73.202(b)) MM Docket No. 94-78
Table of Allotments,) RM-8472
FM Broadcast Stations.) RM-8525
(Cloverdale, Montgomery)
and Warrior, Alabama))

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OPPOSITION TO PETITION FOR RECONSIDERATION

North Jefferson Broadcasting Company, Inc. ("WLBI"), licensee of Station WLBI(FM), Channel 254C3, Warrior, Alabama, and Deep South Broadcasting Company ("WBAM"), licensee of Station WBAM-FM, Channel 255C, Montgomery, Alabama (hereinafter referred to as "WLBI/WBAM")^{1/}, jointly, by their counsel, hereby submit their opposition to the Petition for Reconsideration ("Petition") filed on January 11, 1996, by William P. Rogers ("Rogers"), to the Report and Order in this

^{1/} On November 30, 1995, the Commission granted an application filed by North Jefferson Broadcasting Company, Inc., seeking Commission consent to assign the license of WLBI to North South Broadcasting Company, L.L.C. (BAPLH-950929GJ). See Public Notice of December 5, 1995. The assignment has not yet been consummated.

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proceeding, released December 11, 1995.^{2/} In opposition to the Petition, WLBI/WBAM state as follows:

I. Introduction

1. WLBI/WBAM were the successful parties in a rule making proceeding in which the Chief, Allocations Branch, granted their request to substitute Channel 254C1 for Channel 254C3 at Warrior and to downgrade Station WBAM-FM from Channel 255C to Channel 255C1 at Montgomery. In doing so, the Chief, Allocations Branch, ruled that the proposals and counterproposals by Pulaski Broadcasting, Inc. ("Pulaski"), Leland Michael Tracy ("Tracy"), and William P. Rogers ("Rogers") were unacceptable. Rogers proposed to allocate Channel 254A to Florence, Alabama.

2. The Chief, Allocations Branch, rejected the counterproposal of Rogers for three reasons: (1) it was short spaced to the licensed site of Station WZLQ(FM), Channel 253C1, Tupelo, Mississippi, and was contingent on the relocation of Station WZLQ(FM) to a site where a construction the permit had been expired for more than 30 days; (2) the allotment would not provide a city grade signal to the entire proposed community; and (3) Rogers' engineer used terrain enhancement to demonstrate coverage of more than 80% of the city.

^{2/} Public Notice of the Petition for Reconsideration was issued on January 31, 1996, setting an opposition deadline of February 15, 1996.

3. In his Petition for Reconsideration, Rogers asserts that the Chief, Allocations Branch, was wrong on all counts. In response to the Chief, Allocations Branch's determination that the Florence proposal is short spaced to the licensed site of Station WZLQ(FM), Rogers contends that although the construction permit for WZLQ(FM) at a non-short spaced site has expired, it has not been deleted by the Commission and, until it is deleted, it remains in effect.

II. Discussion

4. Rogers believes the Florence proposal is viable because the authorization for WZLQ(FM) at a non-short spaced site is still active. To the contrary, the authority to build WZLQ(FM) at a new site expired on September 24, 1995. At the time the Report and Order was released, the Chief, Allocations Branch, stated that he was unaware of any application for replacement of the expired permit.^{3/} When the Chief, Allocations Branch, granted WLBI/WBAM's request to substitute channels in Warrior and Montgomery, he effectively determined that San-Dow had been given adequate time to file a replacement application and that it was no longer in the public interest for the Commission to delay action on the WLBI/WBAM request in the rule making proceeding.

^{3/} The licensee of WZLQ(FM), San-Dow, in fact filed an application for replacement of an expired construction permit on November 21, 1995, more than 30 days after the expiration date of the authorization and in violation of Section 73.3534(e) of the Commission's Rules.

5. The Commission must not reconsider the expiration of the WZLQ(FM) authorization and grant the Florence proposal if doing so will alter WLBI's authorization to operate on Channel 254C1 as ordered in the Report and Order. In Amendment of Section 73.3598 and Associated Rules Concerning Construction of Broadcast Stations, 102 FCC 2d 1054 (1985), the Commission stated that "if stations are not constructed in the allowed time . . . , others more able to commence operations and provide expeditious service to the public will be given the opportunity to apply for the frequency involved."^{4/} The grant of authority to WLBI to operate on Channel 254C1, in part because of the expiration of the WZLQ(FM) authorization, is a perfect illustration of the Commission's processes serving the public interest of providing expeditious service to the public and therefore should not be rescinded.

6. As discussed more fully below, the Florence allotment should not be granted for technical reasons. Nevertheless, even if the Commission determines that it is in the public interest to grant the application for replacement of the expired Tupelo construction permit, the WLBI upgrade at Warrior can be affirmed consistent with that action. Therefore, it is not necessary even to await action here on the Tupelo replacement application.

^{4/} Id. at 1057.

7. The petition for reconsideration filed by Rogers was based, in large part, upon the fact that WZLQ's application for replacement keeps Rogers counterproposal alive. However, the Commission should not allow such contingencies to delay otherwise grantable proposals like that of WLBI. Now Rogers' proposal is contingent on a replacement application which will further delay action on WLBI's upgrade. In considering whether to waive its procedural rules and allow contingencies, the Commission staff must take into account the effect of its action in delaying the effectuation of the WLBI upgrade.

8. The second reason the Chief, Allocations Branch, rejected the Florence proposal is that, notwithstanding the short spacing to the Tupelo license site, the Florence allotment would not provide a city grade contour to the entire community of Florence in violation of Section 73.315(a) of the Rules. A waiver of this rule would be necessary in order to grant the Florence proposal. However, it is standard Commission practice to deny waivers of the city grade contour requirement at the allotment stage. See Greenwood, South Carolina, 3 FCC Rcd 4108 (1988).

9. Rogers' contention that "there is no logical reason why the processing line standards should be any different from the requirements of the Allocations Branch" is incorrect. In Greenwood, South Carolina, the Commission explained that, at the application stage, "the Commission has before it the information

necessary to make informed judgments" regarding waiver requests of the city grade coverage requirement. "The Commission generally cannot, in the course of rule making proceedings, evaluate the actual transmitter sites that will be specified in applications not yet filed."^{5/}

10. Rogers cites Bay Shore, New York, 57 RR 2d 1275 (1985), as one instance where the Commission waived the city grade coverage requirement in the rule making context. However, the Commission has stated that "in the Bay Shore case the evidence presented in the rule making showed that there was only one site from which to operate a station serving the affected community, regardless of the extent of any waiver. Thus, the Commission there had no reason to limit consideration of a Section 73.315(a) waiver to the application stage."^{6/} Unlike the petitioner in Bay Shore, Rogers fails to provide an adequate basis to justify grant of a waiver request at the allotment stage.

11. The last reason given by the Chief, Allocations Branch, in rejecting the Florence proposal is that Rogers' engineer used terrain enhancement to demonstrate coverage of more than 80% of the city. Again, the Commission's rationale for not permitting the petitioner in a rule making proceeding to use this option is the lack of certainty as to eventual site

^{5/} Greenwood, South Carolina, at 4109.

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location. The use of actual terrain conditions to predict signal coverage at the allotment stage is too speculative because there may be several applicants at several different sites who will be forced to offer less than 80% coverage. Even with terrain enhancement, Rogers' proposal falls short of the required 100% coverage of Florence. Thus, there is no valid reason for waiving the city grade coverage rule in this allotment proceeding.

Accordingly, the Petition for Reconsideration filed by William P. Rogers should be denied.

Respectfully submitted,

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February 15, 1996

CERTIFICATE OF SERVICE

I, Jacqueline Solomon, a secretary in the law firm of Mullin, Rhyne, Emmons and Topel, P.C., do hereby certify that on this 15th day of February, 1996, copies of the foregoing "OPPOSITION TO PETITION FOR RECONSIDERATION" were sent by first class United States mail, postage prepaid, to the following:

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